Supreme Court, U.S.
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No. 05-1548

In the
Supreme Court of the United States

NEAL ROMAN ARMSTRONG, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to a jury trial is violated by the use of acquitted conduct under the preponderance of the evidence standard when determining sentencing enhancements under the advisory United States Sentencing Guidelines?

2. If the answer to the first question is yes, the following question is presented: whether, in a case in which the advisory Guidelines are used, may sentence enhancements imposed by the trial court exceed the sentence authorized by the jury's verdict?

3. Whether the Court of Appeals erred in affirming the conviction of conspiracy to commit money laundering when the Government's proof was both legally and actually insufficient and the conviction violates the Double Jeopardy Clause of the Fifth Amendment?

LIST OF PARTIES

Petitioner certifies that the following is a complete list of the names of all parties.

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Neal Roman Armstrong, Sr.

RESPONDENT:

United States of America

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PRAYER 1

OPINIONS/ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The question of whether acquitted conduct can be used to enhance a sentence that is not authorized by a jury's verdict represents an important question which has not been, but should be, decided by the Supreme Court 4

II. The money laundering statutes cannot be converted to "money spending statutes" to impose criminal liability where none has been created by Congress 8

CONCLUSION 10

APPENDIX "A": Decision of the Eleventh Circuit . . . 1a

APPENDIX "B": Judgment and Sentence of the Trial Court 8a

APPENDIX "C": U.S. CONST. amend. V 17a

APPENDIX "D": U.S. CONST. amend. VI 18a

APPENDIX "E": 18 U.S.C. § 1956(h) 19a

APPENDIX "F": Presentence Investigation Report . . 20a

APPENDIX "G": Indictment 42a

TABLE OF AUTHORITIES

Page(s)

CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) 5, 6

Blakely v. Washington,
124 S.Ct. 2531 (2004) 5, 7

Blockburger v. United States,
284 U.S. 299 (1932) 10

Crist v. Bretz,
437 U.S. 28 (1978) 8, 10

In re Winship,
397 U.S. 358 (1970) 10

Jackson v. Virginia,
443 U.S. 307 (1979) 10

Jones v. United States,
526 U.S. 227 (1999) 5, 6

Ring v. Arizona,
536 U.S. 584 (2002) 5

United States v. Baldwin,
389 F.Supp.2d 1 (D. D.C. 2005) 7

United States v. Booker,
125 S.Ct. 738 (2005) 5, 7

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. Coleman,
370 F.Supp.2d 661 (S.D. Ohio 2005) 7

United States v. Duncan,
400 F.3d 1297 (11th Cir.), *cert. denied,*
126 S.Ct. 432 (2005) 5

United States v. Gray,
362 F.Supp.2d 714 (S.D. W.Va. 2005) 7

United States v. Moncivais,
213 F.Supp.2d 704 (S.D. Tex. 2001) 10

United States v. Pimental,
367 F.Supp.2d 143 (D. Mass. 2005) 7

United States v. Rodriguez,
398 F.3d 1291 (11th Cir.), *cert. denied,*
125 S.Ct. 2935 (2005) 5

United States v. Suba,
132 F.3d 662 (11th Cir. 1998) 9

United States v. Watts,
519 U.S. 148 (1997) 4, 5, 7

United States v. West,
22 F.3d 586 (5th Cir. 1994) 9

TABLE OF AUTHORITIES – Continued

Page(s)

DOCKETED CASES

United States v. Armstrong,
165 Fed.App. 768 (11th Cir. 2006)
(not selected for publication in
the Federal Reporter) . . . . . *passim*

CONSTITUTIONS

U.S. CONST. amend. V 2

U.S. CONST. amend. VI 2

STATUTES

18 U.S.C. § 1956(a)(1)(A)(i) 9

18 U.S.C. § 1956(h) 2, 9

U.S. SENTENCING GUIDELINES MANUAL

U.S. SENTENCING GUIDELINES MANUAL
§ 2S1.1(a)(1) (2004) 7

U.S. SENTENCING GUIDELINES MANUAL
§ 2S1.1(a)(2) (2004) 7

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review that court's January 31, 2006 Judgment and Opinion in this proceeding.

OPINIONS/ORDERS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit entered on January 31, 2006, and from which review is sought is unreported but can be found at 165 Fed.App. 768, is attached as Appendix "A."

The Judgment and Sentence of the United States District Court for the Middle District of Alabama entered on February 23, 2005, from which Petitioner appealed, is attached as Appendix "B."

JURISDICTION

The Opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 31, 2006. This Petition for Writ of Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case arises under the Fifth and Sixth Amendments to the United States Constitution and 18 U.S.C. § 1956(h). The constitutional provisions and statute are reprinted in the Appendix as Appendices "C," "D" and "E."

STATEMENT OF THE CASE

On May 9, 2003, Wallace Pickett was arrested in Montgomery, Alabama for taking possession of a package mailed from Christiansted, St. Croix, United States Virgin Islands, which had previously been identified by federal law enforcement officials as containing a suspected amount of cocaine. (1R. 25-29, 34-36, 40-43, 137-138.)

Upon custodial interview by federal authorities, Wallace Pickett indicated that he was being supplied with the cocaine by the Petitioner. Wallace Pickett additionally indicated that he paid for the cocaine by United States Postal Money Orders. (1R. 98-100.)

Based on the information obtained from Wallace Pickett, the Petitioner was subsequently charged in a four count federal indictment with conspiracy to distribute and possession with intent to distribute cocaine, distribution of cocaine, mailing injurious materials, and conspiracy to launder monetary instruments in the Middle District of Alabama. The Petitioner was arrested by Deputy United States Marshals in Christiansted, St. Croix, United States Virgin Islands. (Doc. 1.)

On November 1, 2004 through November 3, 2004, the case was tried before a jury, with the Honorable W. Harold

Albritton, III, United States District Judge for the Middle District of Alabama, Northern Division, presiding. (1R. 4-182; 2R. 185-284; 3R. 286-292.)

On November 2, 2004, at the close of the Government's case-in-chief, the Petitioner filed and presented his Motion for Directed Verdict of Acquittal. (2R. 230-234; Doc. 97, pp. 1-3.) The district court denied the Petitioner's Motion for Directed Verdict of Acquittal. (2R. 236-238.) On November 3, 2004, the jury returned a verdict of guilty on Count 4 of the Indictment and did not reach a verdict as to Counts 1 and 2. Count 3 had been previously dismissed by the Government before the start of trial. (3R. 289-290; Doc. 101.) The Government subsequently dismissed Counts 1 and 2 with prejudice after trial. (3R. 291.)

On February 23, 2005, the district court sentenced the Petitioner to serve one-hundred nine months in the custody of the Bureau of Prisons on the conspiracy to launder monetary instruments charge, imposed a supervised release term of three years, and imposed a one-hundred-dollar special assessment. (4R. 54-55; Doc. 126.)

On February 24, 2005, the Petitioner timely filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. On January 31, 2006, a panel of the Eleventh Circuit consisting of Anderson, Barkett and Hull, Circuit Judges, filed its Opinion and affirmed the judgment and sentence of the district court. This present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The question of whether acquitted conduct can be used to enhance a sentence that is not authorized by a jury's verdict represents an important question which has not been, but should be, decided by the Supreme Court.

The Petitioner was convicted on Count 4 of the Indictment and was sentenced to a term of one-hundred nine months imprisonment after the district court fully adopted the Presentence Investigation Report of the United States Probation Department, despite the objections proffered by the Petitioner. (4R. 3-56; Doc. 122; Doc. 126.)

In the case at bar, the Petitioner has been essentially acquitted of the alleged drug offenses contained in Counts 1 and 2 of the Indictment. The jury did not find and the Government dismissed the charge, with prejudice, that the Petitioner conspired to distribute and possess with intent to distribute 500 grams or more of cocaine (Count 1). The jury did not find and the Government dismissed the charge, with prejudice, that Petitioner aided and abetted in the distribution of cocaine (Count 2).

Despite the jury's verdict and the Government's subsequent dismissals, the district court used the "acquitted conduct" attributed to Counts 1 and 2 of the Indictment to impermissibly enhance the Petitioner's sentence above the statutory maximum.

This Court in *United States v. Watts,* 519 U.S. 148, 150 (1997), addressed whether, under the mandatory sentencing guideline regime, a sentencing judge could consider conduct of which a criminal defendant had been acquitted at trial, using a preponderance of the evidence standard. This Court

found, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* The Eleventh Circuit has adopted this approach in its case law. *See United States v. Duncan,* 400 F.3d 1297, 1304-1305 (11th Cir.), *cert. denied,* 126 S.Ct. 432 (2005); *United States v. Rodriguez,* 398 F.3d 1291, 1300 (11th Cir.), *cert. denied,* 125 S.Ct. 2935 (2005).

It is respectfully submitted that the *Watts* decision is no longer good law when contrasted with recent Supreme Court precedent. The viability of *Watts* was questioned by Justice Stevens' constitutional majority opinion in *United States v. Booker,* 125 S.Ct. 738 (2005). While stating that *Watts* was not inconsistent with the decision in *Booker*, Justice Stevens remarked that *Watts* did not involve "any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment. The issue we confront today simply was not presented." *Booker,* 125 S.Ct. at 754. By this petition, the issue is now squarely before this Court.

This Court's pronouncements in *Booker, Jones, Apprendi, Ring, and Blakely* have essentially eviscerated any remaining vitality of the holding in *Watts.* These cases, in no uncertain terms, emphasize that a trial court's determination at sentencing must be guided by the jury-authorized verdict. *Blakely v. Washington,* 124 S.Ct. 2531, 2537 (2004) (invalidating a state mandatory sentencing guideline system and holding that when a judge inflicts punishment that the jury's verdict alone does not authorize, "the jury has not found all the facts which the law makes essential to the punishment . . . and the judge exceeds his proper authority") (internal citations omitted); *Ring v. Arizona,* 536 U.S. 584, 609 (2002) (holding unconstitutional a sentencing judge's

finding of an aggravating circumstance necessary for imposition of the death penalty because it exposed Ring to a greater punishment than authorized by the guilty verdict); *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) (invalidating a state "hate crime enhancement" because it doubled the maximum jury-authorized sentence and held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt); *Jones v. United States,* 526 U.S. 227, 251-252 (1999) (concluding that a federal carjacking statute, which delineated imprisonment terms based on the extent of harm required the Government to prove the level of harm to the jury by proof beyond a reasonable doubt).

The holding by the Eleventh Circuit in the case at bar and its controlling precedent makes no sense, is totally illogical and is in complete contravention of the recent jurisprudence of this Court.

A criminal defendant has the absolute right, from eighteenth century England up to this present day in the United States of America, to have a "jury of his peers" decide his fate, either finding him guilty of the offense charged, finding guilt of a lesser included offense or by acquitting him altogether. This right is guaranteed by the Sixth Amendment to the United States Constitution. With the present situation, a prosecutor gets basically "two bites at the apple."

In this case, the Petitioner cannot be held legally responsible for conspiracy with intent to distribute and possess 500 grams or more of cocaine nor with actual possession of 500 grams or more of cocaine because the jury did not find these facts. By finding that the Petitioner was criminally responsible for the "acquitted" conduct alleged in Counts 1

and 2 of the Indictment, the district court violated the Petitioner's right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution. *See Booker; Blakely, supra.* Additionally, more and more federal district courts are now coming to the conclusion that *Watts* is no longer good law and that a district court violates the Sixth Amendment by enhancing sentences in contravention to a jury's verdict. *See United States v. Baldwin,* 389 F.Supp.2d 1, 2 (D. D.C. 2005) (if acquitted conduct could be considered at sentencing, the burden of proof would be proof beyond a reasonable doubt); *United States v. Coleman,* 370 F.Supp.2d 661, 665-673 (S.D. Ohio 2005) (at sentencing, acquitted conduct should always be considered using reasonable doubt standard; otherwise right to jury trial is eviscerated); *United States v. Gray,* 362 F.Supp.2d 714, 721 (S.D. W.Va. 2005) ("The reasoning in *Watts* . . . was drawn into serious question by the constitutional majority in *Booker.*"); *United States v. Pimental,* 367 F.Supp.2d 143, 150-151 (D. Mass. 2005) (characterizing Justice Stevens' language as questioning *Watts'* underlying proposition).

Since none of the relevant conduct contained in Counts 1 and 2 of the Indictment is attributable to the Defendant, the advisory Sentencing Guideline that should have been consulted is § 2S1.1(a)(2) instead of § 2S1.1(a)(1). As such, the base level offense is eight (8). Since it is uncontroverted by all parties that the Petitioner has a Criminal History Category of I, the Petitioner's sentence should have been in the range of 0-6 months. Since the Petitioner, at the time of sentencing, had already served over nine (9) months in federal detention, he had already served the statutory maximum sentence and should have been released from further custody.

The present case is "ripe" for clarification and decision concerning whether "acquitted conduct" can be used to

enhance a sentence in contravention to a jury's verdict when juxtaposed with this Court's recent jurisprudence and the Supreme Court is respectfully invited to resolve this issue.

II. The money laundering statutes cannot be converted into "money spending statutes" to impose criminal liability where none has been created by Congress.

Upon reading the district court's order entered on November 10, 2004, the Petitioner respectfully submits that the district court, and subsequently the Eleventh Circuit, misread the Petitioner's argument concerning his Motion for Judgment of Acquittal.

The Petitioner has not argued that he is entitled to an acquittal due to the fact of inconsistent jury verdicts, the Petitioner is arguing that he is entitled to an acquittal due to the fact that since the Government has dismissed the substantive charges (including conspiracy) in Counts 1 and 2 of the Indictment and that the Double Jeopardy Clause of the Fifth Amendment bars their re-prosecution, as a matter of law, there can be no conspiracy to commit money laundering because no substantive offense related to any alleged conspiracy to commit money laundering has been found by a jury and/or district court, as to this Petitioner. *See Crist v. Bretz,* 437 U.S. 28, 35-39 (1978). In its order, which has been affirmed by the Eleventh Circuit, the district court has mistakenly held that the Petitioner was convicted by the jury of money laundering. Such is not the case.

The Petitioner was charged in Count 4 of the Indictment with conspiracy to launder money derived from illegal drug

proceeds (18 U.S.C. § 1956(h))[1] and not with the substantive offense of money laundering (18 U.S.C. § 1956(a)(1)(A)(i)). That is a distinction with a difference. The money laundering statutes cannot be converted into "money spending statutes" to impose criminal liability where none has been created by Congress. *See United States v. Suba,* 132 F.3d 662, 674-675 (11th Cir. 1998) (discussing money laundering statute); *United States v. West,* 22 F.3d 586, 579-591 (5th Cir. 1994) (discussing elements of money laundering).

Count 1 of the Indictment alleges conspiracy to possess with intent to distribute 500 grams or more of cocaine. At trial, the Government alleged "one giant" conspiracy concerning Counts 1 and 4 and has never alleged and/or proved multiple conspiracies. (2R. 254.) Although Counts 1 and 4 of the Indictment did not charge violations of the same statutes, there is significant overlap in the offenses charged. Additionally, this Court is asked to take judicial notice that Count 4 of the Indictment actually references the alleged conspiracy in Count 1 as its "lynchpin." Since the jury could not reach a verdict on Count 1 of the Indictment, the Government dismissed Count 1 "on the merits" (essentially an acquittal of an alleged conspiracy) and the Double Jeopardy Clause of the Fifth Amendment bars its re-prosecution by the Government. Although there is no overlap between the statutory offenses charged in Counts 1 and 4 of the Indictment, those offenses are so interrelated in such a way as to evidence a single conspiratorial agreement. Since the

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[1] 18 U.S.C. § 1956(h) reads:

Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy. (Emphasis added).

Petitioner was essentially acquitted of conspiracy in Count 1 and Count 4 involves the same conspiracy, the Petitioner is entitled to this Court reversing the judgment of the Eleventh Circuit and the district court and entering a judgment of acquittal on Count 4 pursuant to the Double Jeopardy Clause of the Fifth Amendment. *See, e.g., Blockburger v. United States,* 284 U.S. 299 (1932); *United States v. Moncivais,* 213 F.Supp.2d 704, 706-710 (S.D. Tex. 2001).

The Government must prove beyond a reasonable doubt every fact that constitutes an essential element of the crime charged against the Petitioner. *In re Winship,* 397 U.S. 358, 364 (1970). When considering the sufficiency of the evidence on review, the proper inquiry is not whether the reviewing court itself believes that the evidence established guilt beyond a reasonable doubt but "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

Under the *Blockburger, Crist, Winship,* and *Jackson* standards, the Government failed to fully carry its burden of proof as it pertains to Count 4 of the Indictment.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the January 31, 2006 Opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12959

[Filed January 31, 2006]

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
NEAL ARMSTRONG,	)
a.k.a. Neil Armstrong,	)
Defendant-Appellant.	)
	)

Before ANDERSON, BARKETT and HULL, Circuit Judges.

OPINION

PER CURIAM:

After a jury trial, Neal Roman Armstrong ("Armstrong") appeals his conviction and 109-month sentence for conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). After review, we affirm Armstrong's conviction and sentence.

I. BACKGROUND

On May 9, 2003, Wallace Pickett ("Pickett") was arrested in Montgomery, Alabama, for taking possession of a package containing 499.5 grams of cocaine that had been mailed to him from the United States Virgin Islands. After a series of interviews, Pickett eventually informed federal authorities that Armstrong had mailed the cocaine from the Virgin Islands, that Armstrong had supplied Pickett with cocaine on multiple occasions, and that Pickett paid Armstrong for the cocaine by United States Postal Money Orders. Pickett also informed the authorities that he sometimes directed Roderick Perkins ("Perkins") to purchase the money orders sent to Armstrong.

On May 5, 2004, Armstrong was charged in a four-count indictment with conspiracy to distribute and possession with intent to distribute cocaine (Count I), distribution of cocaine (Count II), mailing injurious materials (Count III), and conspiracy to launder monetary instruments (Count IV). Prior to trial, the government voluntarily dismissed Count III.

Both Pickett and Perkins testified at Armstrong's trial. Pickett testified that he met Armstrong in Montgomery, Alabama in the summer of 2002, at which point they agreed to conduct business related to cocaine distribution. According to Pickett's testimony, Armstrong shipped cocaine from the Virgin Islands to Pickett on three or four occasions, beginning in March 2003. Pickett testified that Armstrong sent roughly a quarter kilogram of cocaine on at least two occasions and roughly half a kilogram of cocaine once, in the package intercepted by authorities on May 9, 2003. Per Armstrong's instructions, Pickett paid Armstrong for the cocaine by sending postal money orders by express mail.

Perkins testified that he sometimes assisted Pickett in purchasing and sending money orders to Armstrong. When Perkins purchased and mailed the money orders, Perkins was aware that they were being sent to Armstrong as payment for cocaine, which Armstrong was sending from the Virgin Islands to Montgomery, Alabama.

The government also presented evidence that (1) Armstrong had signed for express mail packages sent by Pickett and Perkins on April 15, 2003, and May 5, 2003; (2) Armstrong's sister signed for an express mail package from Pickett and Perkins on April 23, 2003; and (3) Armstrong endorsed and signed for five money orders totaling $5,000, which had been purchased by Pickett and Perkins on April 15, 2003.[1]

On November 3, 2004, the jury found Armstrong guilty of Count IV, conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). The jury could not reach a unanimous decision as to Counts I and II. After trial, the district court granted the government's motion to dismiss Counts I and II with prejudice.

The United States Probation Office prepared a presentence investigation report ("PSI"). The PSI determined that Armstrong was accountable for the 499.5 grams of cocaine

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[1] According to Pickett and Perkins, they purchased and sent to Armstrong money orders totaling $5,000 on April 15, $5,000 on April 23, and $8,000 on May 5. However, the government presented evidence identifying Armstrong's endorsement and signature only on the April 15 money orders. The endorsements and signatures for the remaining money orders, sent by Pickett and Perkins to the Virgin Islands, could not be traced to any known person.

Pickett received in May 2004 and for two separate 250-gram packages Pickett received in April 2004, for a total amount of 999.5 grams of cocaine. As such, the PSI recommended a base offense level of 26. *See* U.S. Sentencing Guidelines § 2S1.1(a)(1) (stating that the base offense level for a charge of conspiracy to launder monetary instruments in circumstances applicable to Armstrong is "the offense level for the underlying offense from which the laundered funds were derived"); U.S.S.G. § 2D1.1(c)(7) (assigning a base offense level of 26 for unlawful distribution of at least 500 grams but less than two kilograms of cocaine). The PSI also recommended a specific offense enhancement of two levels, *see* U.S.S.G. § 2S1.1(b)(2)(B) (two-level enhancement for violation of 18 U.S.C. § 1956), and a two-level enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, for an adjusted offense level of 30. The PSI assigned Armstrong a criminal history category of I, with a resulting guidelines imprisonment range of 97 to 121 months.

The district court conducted a sentencing hearing on February 23, 2005. After hearing from witnesses, the district court found by a preponderance of the evidence that 999.5 grams of cocaine should be attributed to Armstrong and that Armstrong had obstructed justice by attempting to solicit the murder of Wallace Pickett prior to trial. The district court rejected Armstrong's argument that enhancing his sentence based on these findings would violate *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), asserting that such extra-verdict enhancements were permissible under an advisory guideline system. After considering the advisory guidelines range for an offense level of 30 and criminal history category of I, the district court sentenced Armstrong to 109 months in prison, finding such a sentence reasonable.

II. DISCUSSION

Armstrong was convicted of violating 18 U.S.C. § 1956(h), which makes it unlawful to "conspire[] to commit *any* offense defined in [18 U.S.C. § 1956]. . . ." 18 U.S.C. § 1956(h) (emphasis added). Specifically, Armstrong was convicted of conspiring to commit the offense defined by 18 U.S.C. § 1956(a)(1)(A)(i). That subsection of Section 1956 makes it unlawful (1) to conduct or attempt to conduct a financial transaction (2) that the defendant knows involves the proceeds of some form of unlawful activity (3) with "the intent to promote the carrying on of [the] specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i); *see United States v. Carcione*, 272 F.3d 1297, 1302 (11th Cir. 2001) (quoting 18 U.S.C. § 1956(a)(1)(A)(i)). At trial, the government presented evidence that (1) Armstrong cashed or attempted to cash the money orders mailed by Pickett and Perkins; (2) Armstrong knew that the money orders represented the proceeds of the illegal sale of cocaine; and (3) Armstrong took the money in exchange for cocaine he shipped to Perkins with intent to facilitate the illegal sale of cocaine.

On appeal, Armstrong argues that the evidence was insufficient to support a guilty verdict on Count IV in two respects. First, Armstrong contends that the government presented no evidence that he concealed or disguised the nature or source of the money orders he cashed. While Armstrong is correct, concealment is not a necessary element of the offense of which he was convicted, *see* 18 U.S.C. § 1956(a)(1)(A)(i); *United States v. Williamson*, 339 F.3d 1295, 1301 n.15 (11th Cir. 2003), *cert. denied*, 540 U.S.

1184, 124 S. Ct. 1427, 158 L. Ed. 2d 88 (2004).[2] No evidence of concealment was necessary to convict Armstrong of Count IV.

Second, Armstrong asserts that because he was not convicted of the conspiracy to distribute cocaine charged in Count I, his § 1956(h) conviction for conspiracy to launder monetary instruments derived from the same distribution of cocaine must be reversed. Contrary to Armstrong's argument, "[a defendant's] personal involvement in, or guilt of, the [underlying drug activity] is not an element of the money laundering charge he was convicted of in this case." *United States v. Magluta*, 418 F.3d 1166, 1174 (11th Cir. 2005). The government did not need to prove Armstrong's personal involvement in drug activities, but rather only that Armstrong, "with the requisite knowledge and intent, conducted a financial transaction involving the proceeds of felony drug offenses." *Id.*; *see also United States v. Lozano-Hernandez*, 89 F.3d 785, 789 (11th Cir. 1996) (conviction on only one of two related counts may be upheld where "different elements comprise the two offenses, and, in any event, inconsistent jury verdicts are not necessarily a cause for reversal of a conviction.") (citing *United States v. Powell*, 469 U.S. 57, 65-67, 105 S. Ct. 471, 477, 83 L. Ed. 2d 461 (1984)).

Finally, Armstrong argues that his constitutional rights were violated because his sentence was enhanced based on facts not found by the jury. *United States v. Booker*, 543 U.S.

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[2] While concealment is an element of 18 U.S.C. § 1956(a)(1)(B)(i), Armstrong was convicted of conspiracy to violate 18 U.S.C. § 1956(a)(1)(A)(i). Concealment is not an element of 18 U.S.C. § 1956(a)(1)(A)(i).

220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). As the district court correctly noted, "the use of extra-verdict enhancements in a non-mandatory guidelines system is not unconstitutional." *United States v. Rodriguez*, 398 F.3d 1291, 1300 (11th Cir.), *cert. denied*, 125 S. Ct. 2935, 162 L. Ed. 2d 866 (2005). Consistent with *Booker*, the district court properly calculated Armstrong's guideline range, relying only on facts the government had proven by a preponderance of the evidence. *See United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir.), *cert. denied*, 126 S. Ct. 432, 163 L. Ed. 2d 329 (2005) (stating that even after *Booker*, a sentencing court still may consider conduct of which a defendant was acquitted, "as long as the government proves the acquitted conduct relied upon by a preponderance of the evidence.") (quotation marks and citation omitted). The district court then properly applied the calculated Guidelines range in an advisory fashion. *See Rodriguez*, 398 F.3d at 1300. We readily conclude that Armstrong's sentence was consistent with *Booker* and did not violate his Sixth Amendment rights.

Accordingly, we affirm Armstrong's conviction and sentence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

Case No: 2:04cr084-A
USM No: 07406-094

[Filed February 25, 2005]

UNITED STATES OF AMERICA)
)
V.)
)
NEAL ROMAN ARMSTRONG)
a/k/a NEIL ARMSTRONG)
)

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:
[X] was found guilty on count(s) 4 of the Indictment by a jury on November 3, 2004 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1956(h)	Conspiracy to Launder Monetary Instruments	5/12/04	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] Count(s) 1, 2 and 3 [X] are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of material changes in economic circumstances.

February 23, 2005
Date of Imposition of Judgment

/s/
Signature of Judge

W. HAROLD ALBRITTON, SENIOR
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

2/25/05
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

109 months.

[X] The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

three (3) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[X] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[X] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall participate in drug testing and/or treatment if directed by the probation officer. Defendant shall contribute to the cost of any treatment based on ability to pay and availability of third party payments.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ -0-	$ -0-

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S. C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [X] Lump sum payment of $100.00 due immediately, balance due
[X] in accordance [X] F below

F [X] Special instructions regarding the payment of criminal monetary penalties:
Payment shall be made to the Clerk, U.S. District Court, P. O. Box 711, Montgomery, AL 36101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

MINUTES

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
ALABAMA, NORTHERN DIVISION**

W. HAROLD ALBRITTON, SENIOR U.S. DISTRICT JUDGE, PRESIDING, AT MONTGOMERY, AL

DATE COMMENCED: February 23, 2005 AT: 1:07 p.m.

DATE COMPLETED: February 23, 2005 AT: 2:30 p.m.

UNITED STATES OF AMERICA	)	
vs.	)	CR. No. 2:04cr084-A
NEAL ARMSTRONG	)	

APPEARANCES:

GOVERNMENT
Susan R. Redmond
Lewis Franklin

DEFENDANT
Joseph R. Willie

COURT OFFICIALS PRESENT

Risa Entrekin, Court Reporter
Elna Behrman, Courtroom Deputy
Natalie Leonard, Law Clerk

COURTROOM PROCEEDINGS

(X) SENTENCING

Court stated that the Motion for Judgment of Acquittal contained in the Defendant's Sentencing Memorandum is overruled.

Testimony heard as to objections to presentence report.
Arguments heard from attorneys as to the objections.
Court stated Findings of Fact:

Objections #1 and #3 as to amount of drugs are overruled.
Objection #2 as to enhancement for obstruction of justice is overruled.
Objection #4 as to enhancement for offense characterization is overruled.

Defendant renewed motion and objections. Court overruled motion and objections.

Sentence stated.
Defendant objected to sentence. Court overruled the objection.
Sentence imposed as read.

Court adjourned.

APPENDIX C

Fifth Amendment To The United States Constitution (1789)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Sixth Amendment To The United States Constitution (1789)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX E

18 U.S.C. § 1956(h)

Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

Docket No. 2:04cv84-A

[Filed February 23, 2005]

UNITED STATES OF AMERICA	)
	)
vs.	)
	)
NEAL ARMSTRONG	)
a/k/a NEIL ARMSTRONG	)
	)

PRESENTENCE INVESTIGATION REPORT

Prepared for: The Honorable W. Harold Albritton
Senior United States District Judge

Prepared by: Jo Ann Sellers
United States Probation Officer
Montgomery, Alabama
(334) 954-3239

Assistant U.S. Attorney
Todd A. Brown/Susan Redmond
One Court Square
Suite 201
Post Office Box 197

Montgomery, AL 36101-0197
(334) 223-7280

Defense Counsel
Joseph R. Willie, II
Attorney at Law
1301 Leeland, Suite 210
Houston, TX 77002
(713) 659-7330

Sentence Date:	February 23, 2005, @ 9:00 a.m.
Offense:	Count 4: Conspiracy to Launder Monetary Instruments 18 U.S.C. § 1956(h) - 20 Years/$500,000 fine A Class C felony
Release Status:	May 12, 2004: Arrested by U.S. Marshals. Custody of the U.S. Marshal
Detainers:	None known
Codefendants:	Roderick Perkins Docket No. 2:04cr84-A-002
Related Cases:	Wallace Pickett Docket No. 2:03cr00116-001

Date Report Prepared:
January 24, 2005

Date Report Revised:
February 14, 2005

Related Cases

8. On September 5, 2003, Wallace Pickett pled guilty in the Middle District of Alabama, to Possession with Intent to Distribute Cocaine Hydrochloride and Mailing Poisonous Drugs to-wit: Cocaine Hydrochloride through the United States Postal Service. On April 23, 2004, Pickett was sentenced to 30 months custody of the Bureau of Prisons.

The Offense Conduct

9. On May 7, 2003, the Mobile, Alabama, office of the Bureau of Immigration and Customs Enforcement (ICE) received notification from the San Juan, Puerto Rico, ICE office regarding a suspicious U. S. Express Mail parcel discovered by customs and border protection inspectors. The suspicious mail parcel was selected for x-ray examination and revealed an uneven gray shadow. Upon opening the package, customs officials located two white blocks contained in vacuum sealed plastic bags. Agents tested the white powdery substance and it revealed the presence of approximately 530 grams of suspected cocaine. The package was addressed to Corey Smith, 2945 Thrasher Street, Montgomery, Alabama 36107, from Maria Santos, 317 Sion Farm C'Sted, St. Croix 00823.

10. On May 9, 2003, an individual identifying himself as Corey Smith contacted the Capitol Heights Post Office and asked about the status of the package he was expecting. He was advised that the package had not arrived. The individual left a contact telephone number to be reached at upon the package's arrival. On May 12, 2003, at approximately 9:02 a.m., a United States Postal Inspector contacted the individual identifying himself as

Corey Smith and advised him that his package was at the Capitol Heights Post Office ready for pick-up. At approximately 9:35 a.m., an individual arrived at the post office and presented a claim ticket for the package. The postal inspector asked him if he was Corey Smith to which he replied yes. The individual took possession of the package and signed the name "Corey Pickett." Upon the subject exiting the post office, he was placed under arrest without incident and identified as Wallace Pickett. Laboratory analysis of the cocaine seized in his possession revealed the presence of 499.5 grams of cocaine hydrochloride.

11. Pickett was transported to the High Intensive Drug Trafficking Area Task Force Office and was interviewed by federal agents. Pickett advised that Roderick Perkins resided at the 2945 Thrasher Street address. Further investigation revealed that Wallace Pickett was being supplied cocaine hydrochloride by Neal Armstrong, who resided in the Virgin Islands. In addition to the 499.5 grams of cocaine hydrochloride received by Pickett from Armstrong on May 9, 2003, Pickett had previously received one-fourth kilogram of cocaine hydrochloride on two separate occasions from Armstrong.

12. Pickett paid for the cocaine hydrochloride through United States postal money orders. On April 15, 2003, Pickett sent five postal money orders, made out to Neal Armstrong, in the amount of $1,000 per order. At the direction of Picket, the express labels and money order faces were filled out by Roderick Perkins. On April 23, 2003, Pickett sent five postal money orders made out to Neal Armstrong, in the amount of $1,000 per order. At the direction of Pickett, the express labels were filled out by Roderick Perkins. On May 5, 2003, Pickett sent eight

postal money orders made out to Neal Armstrong, in the mount of $1,000 per order. At the direction of Pickett, the express labels were filled out by Roderick Perkins.

Determination of Drug Amount

13. Neal Roman Armstrong, Jr., is held accountable for the 499.5 grams of cocaine hydrochloride received by Wallace Pickett on May 9, 2003, and for the one-fourth kilogram of cocaine hydrochloride (250 grams) received by Wallace Pickett on two separate occasions, as evidenced by his payment to Neal Armstrong on April 15, 2003, in the amount of $5,000 and April 23, 2003, in the amount of $5,000. Armstrong is accountable for the distribution of a total amount of 999.5 grams of cocaine hydrochloride.

Victim Impact Statement

14. There is no identifiable victim who suffered a physical or financial loss as a result of this offense.

Adjustment for Obstruction of Justice

15. On December 12, 2004, Postal Inspector J.D. Tynan interviewed Ervin Johnson, an inmate at the Montgomery City Jail, regarding his knowledge of a proposition made by Neal Armstrong to Johnson, which involved killing a cooperating defendant named Wallace Pickett. Johnson stated that sometime prior to August 2004, he and Neal Armstrong were inmates at the Montgomery City Jail when Armstrong proposition him about killing Wallace Pickett. Johnson stated that Armstrong was suppose to pay him $500 through Armstrong's girlfriend in the Virgin, Islands and ten kilos of cocaine. Johnson advised that

shortly after that, he was released from the jail before Armstrong paid him any money. Johnson further advised that his bond was revoked and he was placed back in the Montgomery City Jail in federal custody. Johnson advised that Armstrong approached him again about killing Wallace Pickett and made arrangements for a postal money order in the amount of $35 to be deposited into Johnson's account at the Montgomery City Jail. Subsequent investigation by investigator Tynan revealed that on October 4, 2004, a $35 (up front money) postal money order, serial number 92588417965 from L. Millin was deposited into Johnson's account at the Montgomery City Jail. The return address on the money order was from St. Croix, U.S. Virgin Islands.

Adjustment for Acceptance of Responsibility

16. The defendant refused to make a statement to the probation officer during the presentence interview. He entered a plea of not guilty to the charges. He was convicted of Count 4 of the indictment by jury verdict on November 3, 2004. Therefore, the defendant does not qualify for acceptance of responsibility.

Offense Level Computation

17. The 2004 edition of the Guidelines Manual has been used in this case.

18. Base Offense Level: The guideline for a violation of 18 U.S.C. § 1956(h) is found in §2S1.1(a)(1), Laundering of Monetary Instruments, which instructs that the base offense level is the offense level for the underlying offense from which the laundered funds were derived. The laundered funds were derived from the sell of cocaine

hydrochloride in violation of 21 U.S.C. § 841(a)(1). The defendant is held responsible for the distribution of 999.5 grams of cocaine hydrochloride. The guideline for unlawful distribution of at least 500 grams but less than two kilograms of cocaine hydrochloride is found in USSG §2D1.1(3)(C)(7). That guideline provides a base offense level of 26. 26

19. Specific Offense Characteristics: Pursuant to USSG §2S1.1(b)(2)(B), if the defendant was convicted of a 18 U.S.C. § 1956, increase by two levels. +2

20. Adjustment for Role in the Offense: None 0

21. Victim-Related Adjustments: None 0

22. Adjustment for Obstruction of Justice: On December 12, 2004, Postal Inspector J.D. Tynan interviewed Ervin Johnson, an inmate at the Montgomery City Jail, regarding his knowledge of a proposition made by Neal Armstrong to Johnson, which involved killing a cooperating defendant named Wallace Pickett. Johnson stated that sometime prior to August 2004, he and Neal Armstrong were inmates at the Montgomery City Jail when Armstrong proposition him about killing Wallace Pickett. Johnson stated that Armstrong was suppose to pay him $500 through Armstrong's girlfriend in the Virgin, Islands and ten kilos of cocaine. Johnson advised that shortly after that, he was released from the jail before Armstrong paid him any money. Johnson further advised that his bond was revoked and he was placed back in the Montgomery City Jail in federal custody. Johnson advised that Armstrong approach him again about killing Wallace Pickett and made arrangements for a postal money order in the amount of $35 (up front money) to be deposited

into Johnson's account at the Montgomery City Jail. Subsequent investigation by investigator Tynan revealed that on October 4, 2004, a $35 postal money order, serial number 92588417965 from L. Millin was deposited into Johnson's account at the Montgomery City Jail. The return address on the money order was from St. Croix, U.S. Virgin Islands. Therefore, pursuant to USSG §3C1.1, a two level increase is applicable because the defendant attempted to make arrangements to kill a cooperating witness. +2

23. Adjusted Offense Level (Subtotal): 30

24. Adjustment for Acceptance of Responsibility: None. 0

25. Chapter Four Enhancements: None 0

26. Total Offense Level: 30

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

27. None known

Adult Criminal Convictions

	Date of Arrest	Conviction/ Court	Date Sentence Imposed/ Disposition	Guideline/ Points
28.	05/30/91 (Age 19)	Conspiracy to Commit Robbery St. Croix, VI Case No. 333-91	*09/09/92:* 3 years probation.	4A1.2(e)(3) 0

Details of the offense were requested, but were not provided by the U.S. Probation Office in the District Court of the Virgin Islands.

Criminal History Computation

29. The defendant's total criminal history points is zero. According to the Sentencing Table (Chapter 5, Part A), zero to one criminal history points establish a criminal history category of I.

Other Arrests

	Date of Arrest	Charge	Agency	Disposition
30.	01/06/93 (Age 21)	Aggravated Assault & Battery	Virgin Island P.D. St. Croix, VI	10/01/93: Statement of no Prosecution.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

31. Thirty-three year old Neal Roman Armstrong, Sr., was born September 24, 1971, in St. Croix, Virgin Islands. The defendant reported that he was reared by both of his parents until the age of 10 in St. Croix, Virgin Islands. He stated that his parents separated when he was 10 years old, but he had regular contact with and was supported by both parents. The defendant's mother, Luz Armstrong, age 61, is retired. She continues to reside in St. Croix. The defendant's father, Melvin Armstrong, age 62, is also retired and continues to reside in St. Croix.

32. The defendant reported having ten siblings. His oldest sibling, Melvin Armstrong, Jr., is deceased. Alton Armstrong is a correctional officer in St. Croix. George Armstrong is disabled. He resides in Texas. All of the defendant's remaining siblings continue to reside in St. Croix. Romel Armstrong's occupation is unknown. Carol Gerard is employed by the fire department. Carmen Clark is a computer analyst. Sharon Armstrong works for human services. Elise Armstrong is a teacher. Lela Armstrong is unemployed.

33. The defendant reported that he has never been married. He has eight children by six different women. All eight children reside in St. Croix, Virgin Islands. Nealysa Armstrong, age 16, resides with her mother, Alyisa McBean. Jahmal Armstrong, age 13, resides with his mother, Mary Beth Osorio. Nakema Armstrong, age 13, NiKeysha Giddings, age 11, and Renyce Armstrong, age 7, all reside with their mother, Julie Giddings. Jahneal Armstrong, age 6, resides with his mother, Priscilla

Ramos. Neal Armstrong, Jr., age 5, resides with his mother, Glendalee Crassquillio. Nealia Armstrong, age 4, resides with his mother, Rosalyn Morales. The defendant has been ordered to pay child support through the Division of Paternity and Child Support Island of St. Croix for his children with Priscilla Ramos, Mary Osorio and Julie Giddings. It does appear that the defendant is in arrearage in all cases. The defendant advised that he pays money directly to the mothers of his children.

34. According to the defendant and Glendalee Crassquillio, they have lived together for the past seven years. Their son, Neal Armstrong, Jr., continues to reside with his mother at 6C Mon Bijou, St. Croix, Virgin Islands. A home visit was conducted by the U.S. Probation Office in the Virgin Islands on December 8, 2004.

35. The defendant reported that the house Ms. Crassquillio and their son reside in is owned by his father. The defendant intends to reside with Ms. Crassquillio and their child after his release from custody.

Physical Condition

36. The defendant is 5 feet 11 inches tall and weighs 180 pounds. He has brown eyes and brown hair. The defendant reported having tattoos on both of his arms.

37. The defendant advised that he is in good physical health and is on no prescribed medication.

Mental and Emotional Health

38. The defendant reported no history of mental or emotional problems.

Substance Abuse

39. The defendant reported that he does not use any type of illegal substance. He advised that he used marijuana on occasion at the age of 15. He stated he seldom consumes alcohol.

Education and Vocational Skills

40. It was verified through the U.S. Probation Office in the Virgin Islands that the defendant graduated from Santa Cruz Academy, St. Croix, U.S. Virgin Islands on June l l, 1989.

Employment Record

41. From June 24, 1996, until his arrest for the instant offense, the defendant was employed as a lifeguard with the Virgin Islands Housing, Parks and Recreation Department in St. Croix. His salary was $15,500. The defendant received numerous reprimands for: not reporting to work; falsifying time sheets; and excessive tardiness. He was recommended for suspension at the time he was arrested for the instant offense. This was verified through the defendant's employment.

42. From approximately 1994 to 1996, the defendant reported that he was a truck driver for the Virgin Islands Maritime in St. Croix. This business is no longer in existence.

43. The defendant reported that in addition to his employment with the Virgin Islands Housing, Parks and Recreation Department, he bred and trained roosters to fight. He advised that during the month of November, he would make approximately $16,000 selling roosters for fighting

purposes. The U.S. Probation Office in the Virgin Islands advised that they could not verify this information. However, they did confirm that the defendant does raise roosters when they conducted the home visit.

Financial Condition: Ability to Pay

44. The following information was obtained through an interview with the defendant, a signed personal financial statement and a review of his credit bureau report.

ASSETS

Cash	$ .00
Unencumbered Assets	
1997 Toyota Automobile	$ 2,500.00
Equity in Other Assets	
TOTAL ASSETS	$ 2,500.00
Unsecured Debts	
Citi USA	$ 669.00
First Premier	$ 145.00
American Express	$ 1,918.00
Credit Union Loan	$ 3,300.00
TOTAL UNSECURED DEBTS	$ 6,032.00
NET WORTH	$ -3,532.00
Monthly Cash Flow	
Defendant's Income	$ .00

TOTAL INCOME	$ .00
Necessary Living Expenses	$ .00
TOTAL LIVING EXPENSES	$ .00
NET MONTHLY CASH FLOW	$ .00

45. The defendant is in the custody of the United States Marshal and therefore, has no income or living expenses.

46. It does appear that the defendant is in child support arrearage. However, it could not be determined by this office what the arrearage is at this time.

47. Based on the defendant's financial profile, it does not appear that he is in a position to pay a fine.

PART D. SENTENCING OPTIONS

48. In accordance with the recent ruling in *United States v. Booker*, 543 U.S. ___ (2005), where the Supreme Court ruled Federal Sentencing Guidelines are now advisory, it is the opinion of the U.S Probation Office that the Court may sentence a defendant anywhere within the statutory provisions after considering 18 U.S.C. § 3553 when imposing a sentence.

Custody

49. Statutory Provisions: Count 4: The authorized term of imprisonment is not more than 20 years, pursuant to 18 U.S.C. § 1956(a)(1).

50. Guideline Provisions: Based on a total offense level of 30 and a criminal history category of I, the guideline range of imprisonment is 97 to 121 months. Zone D.

Impact of Plea Agreement

51. There was no plea agreement in this case.

Supervised Release

52. Statutory Provisions: Count 4: The authorized term of supervised release is not more than three years, pursuant 18 U.S.C. § 3583(b)(2).

53. Guideline Provisions: Pursuant to USSG §5D1.2(a)(2), authorized term of supervised release is as least two years, but not more than three years. In addition to the standard conditions of supervised release, the defendant is also subject to special conditions of supervised release as provided in USSG §5D1.3(d) and (e).

Probation

54. Statutory Provisions: Count 4: Pursuant to 18 U.S.C. § 3561(a), the defendant is eligible for probation because this is a Class C felony. The authorized term of probation is one to five years, pursuant to 18 U.S.C. § 3561(c)(1).

55. Guideline Provisions: Pursuant to USSG §5C1.1(e)(f), the defendant is not eligible for probation because the applicable guideline range is in Zone D of the sentencing table.

Fines

56. Statutory Provisions: Count 4: The maximum fine is $500,000, pursuant to 18 U.S.C. § 1956(a)(1).

57. A special assessment of $100.00 is mandatory, pursuant to 18 U.S.C. § 3013.

58. Guideline Provisions: Pursuant to USSG §5E1.2(c)(3), the fine range is from $15,000 to $500,000.

59. In determining the amount of the fine, the Court shall consider, among other factors, the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed. USSG §5E1.2(d)(7). The most recent advisory from the Administrative Office of the United States Courts dated March 31, 2004, suggests that a monthly cost of $1,931.97 be used for imprisonment, a monthly cost of $1,590.66 be used for halfway houses, and annual cost of $3,506.53 be used for supervision.

Restitution

60. Statutory Provisions: Pursuant to 18 U.S.C. § 3663, the court may order restitution to the community based on the amount of public harm caused by the offense. In no case should the amount of restitution exceed the amount of the fine ordered for the offense charged in the case.

61. Guideline Provisions: Pursuant to USSG §5E1.1(e), the court shall order an amount of community restitution. If the court is determined that the defendant does not have the ability to pay a fine, no community restitution shall be imposed.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

62. The probation office has no information concerning the offense or the defendant that would warrant a departure from the prescribed guideline range.

Respectfully submitted,

Joseph T. Nash
Chief U.S. Probation Officer

by /s/
Jo Ann Sellers
United States Probation Officer

APPROVED:
/s/
R. Dwayne Spurlock
Supervising U.S. Probation Officer

JAS/lm
Date: February 14, 2005

ADDENDUM TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES V. NEAL ARMSTRONG, a/k/a NEIL ARMSTRONG, DKT. NO. 2:04cr84-A-001

1. The presentence report in this case was disclosed on January 26, 2005. A written response containing objections was due in this office on February 9, 2005.

2. Verbal communication was received from Government counsel on February 9, 2005, and contained no objections to the initial presentence report.

3. This communication was received from Defense counsel on February 9, 2005, and contained objections to the initial presentence report.

4. The meeting to resolve disputed issues was held on February 10, 2005. Any issues listed below could not be resolved.

OBJECTIONS

<u>By the Government</u>

5. The Government has no objections to the presentence report.

By the Defendant

Objection No. One

6. Paragraphs Nos. 9 through 13: The defense objects as follows: "The Supreme Court of the United States in *United States v. Booker*, 125 S.Ct. 738 (2005), 2005 WL 50108, at *6-8, held that the statutory maximum sentence that a district judge may impose must be based on relevant facts found by a jury beyond a reasonable doubt or that have been admitted by a criminal defendant.

7. In the case at bar, the Defendant has been essentially acquitted of the alleged drug offenses contained in Counts 1 and 2 of the indictment. The jury did not find and the Government dismissed the charge with prejudice that the Defendant conspired to distribute and possess with intent to distribute 500 grams or more of cocaine (Count 1). The jury did not find and the Government dismissed the charge with prejudice that the Defendant aided, and abetted in the distribution of cocaine (Count 2).

8. Accordingly, the Supreme Court's opinion in *Booker* precludes the United States Probation Office and the Court from using the alleged conduct contained in Counts 1 and 2 of the indictment in determining the statutory maximum sentence that may be imposed in this case. The Defendant cannot be legally responsible for conspiracy with intent to distribute and possess 500 grams or more of cocaine nor with the actual possession of 500 grams or more of cocaine because the jury did not find these facts. To do so would violate the Defendant's right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution. *See Booker,* at *6-8, 11, 15."

Probation Officer's Response

9. In accordance with the recent ruling in *United States v. Booker,* 543 U.S. __ (2005), where the Supreme Court ruled Federal Sentencing Guidelines are now advisory, it is the opinion of the U.S. Probation Office that the Court may sentence a defendant anywhere within the statutory provisions after considering 18 U.S.C. § 3553 when imposing a sentence.

Objection No. Two

10. Paragraphs Nos. 15 and 22: The defense asserts that Paragraphs 15 and 22 regarding obstruction of justice are "absolutely absurd and have no indicia of veracity, reliability and/or credibility. The PSR contains no basis in fact or law to the conclude that Mr. Armstrong has obstructed justice in any fashion and the defendant vehemently objects to the inclusion of these paragraphs in the PSR. Such allegations must be found by a jury beyond a reasonable doubt. *See Booker,* at *6-8, 11, 15."

Probation Officer's Response

11. The probation officer refers back to and reiterates the above response by the probation office to objection No. One.

12. The government intends to call an additional witness at sentencing to substantiate the defendant's solicitation of Ervin Johnson for the purpose of murdering Wallace Pickett.

13. As stated in the Offense Conduct of the presentence report, Wallace Pickett was dealing directly with the

defendant for the purpose of receiving cocaine hydrochloride through the United States mail by paying him primarily with postal money orders. For the purpose of this enhancement, the probation office relies on USSG §3C1.1, comment. (n.4)(a), which involves threatening, intimidating, or otherwise unlawfully influencing a codefendant, witness, or juror, directly or indirectly, or attempting to do so. Pickett was a cooperating witness for the government.

Objection No. Three

14. Paragraph No. 18: The defense asserts that "Since none of the alleged relevant conduct contained in Counts 1 and 2 of the indictment is attributable to the Defendant, the Sentencing Guideline to be consulted is §2S1.1(a)(2) instead of §2S1.1(a)(1). As such, the base offense level is eight (8). Since the Defendant has a Criminal History Category of I, the Defendant's sentence should be in the range of 0-6 months. Since the Defendant has served nine (9) months in federal detention, he has already served the statutory maximum sentence and should be released from further custody."

Probation Officer's Response

15. The probation officer refers back to and reiterates the response of the U.S. Probation Office to objection No. One.

Objection No. Four

16. Paragraph No. 19: The defense asserts "Since the defendant was not convicted of any underlying drug offense, §2S1.1(b)(2)(B) is not applicable and a +2

offense level increase is not justified nor is it now authorized."

Probation Officer's Response

17. The probation officer refers back to and reiterates the U.S. Probation Office response to objection No. One.

Respectfully submitted,

Joseph T. Nash
Chief U.S. Probation Officer

by /s/
Jo Ann Sellers
United States Probation Officer

Approved:

R. Dwayne Spurlock
Supervising United States Probation Officer

JAS/lm

Date: February 16, 2005

APPENDIX G

**IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF ALABAMA
NORTHERN DIVISION**

No. 2:04CR84-A

[Filed May 5, 2004]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
NEAL ARMSTRONG, a/k/a	)
NEIL ARMSTRONG, and	)
RODERICK PERKINS	)
	)

INDICTMENT

The Grand Jury Charges:

COUNT I

From an unknown date and continuing to and including the month of May, 2003, the exact dates being unknown to the Grand Jury, in Montgomery County, Alabama, within the Middle District of Alabama, the defendants,

NEAL ARMSTRONG, a/k/a
NEIL ARMSTRONG, and
RODERICK PERKINS,

did knowingly and willfully combine, conspire, confederate and agree together, with Wallace Pickett, and with other persons known and unknown to the Grand Jury to knowingly and intentionally distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine hydrochloride, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 846.

COUNT 2

On or about the 12th day of May, 2003, in Montgomery County, within the Middle District of Alabama, the defendants,

NEAL ARMSTRONG, a/k/a
NEIL ARMSTRONG, and
RODERICK PERKINS,

did knowingly and intentionally, aiding and abetting one another, distribute cocaine hydrochloride, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

On or about the 12th day of May, 2003, in Montgomery County, within the Middle District of Alabama, the defendants,

NEAL ARMSTRONG, a/k/a
NEIL ARMSTRONG, and
RODERICK PERKINS,

did knowingly cause to be delivered by mail a package addressed to Corey Smith, 2945 Thrasher Street, Montgomery, Alabama, containing poisonous drugs, to-wit: cocaine hydrochloride, which is nonmailable and not authorized to be mailed by the rules and regulations of the Postal Service, in violation of Title 18, United States Code, Section 1716(j)(1).

COUNT 4

From an unknown date, but commencing at least as early as the month of April, 2003, and continuing up to and including the month of May, 2003, in the Middle District of Alabama and elsewhere, the defendants,

NEAL ARMSTRONG, a/k/a
NEIL ARMSTRONG, and
RODERICK PERKINS,

did knowingly and willfully combine, conspire, and confederate with each other, Wallace Pickett, and with other persons, known and unknown to the Grand Jury, to knowingly conduct, attempt to conduct, and cause to be conducted, financial transactions affecting interstate commerce, to wit: the mailing of United States Postal money orders, using the proceeds of a specified unlawful activity, to-wit: conspiracy to distribute and possess with intent to distribute a controlled substance, and distribution of a controlled substance, in violation of Title 21, United States Code, Sections 846 and 841(a)(1), as charged in Counts 1 and 2, with the intent to promote the carrying on a specified

unlawful activity, all in violation of Title 18, United States Code, Section 1956(h).

A TRUE BILL:

/s/
Foreperson

/s/
LEURA GARRETT CANARY
United States Attorney

/s/
TODD A. BROWN
Assistant United States Attorney